MODERN FREIGHT EXPRESS v. AFZARIZAL ABDUL WAHAB & ORS

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY SUPPIAH J
[ORIGINATING SUMMONS NO: BA-24-49-01-2016]
21 JANUARY 2020

CUSTOMS AND EXCISE: *Seizure – Damages – Claim for – Customs Department seized goods – Notice of seizure of goods served on freight forwarding agent ('agent') appointed by owner – Agent's request for release of goods refused by Customs Department – Person(s) prescribed by law entitled to recover value of goods – Whether agent had locus standi to request for release of goods – Whether Customs Department observed statutory requirements – Whether seizure of goods lawful – Whether there was bailor/bailee relationship between agent and owner – Whether agent in custody and possession of goods – Customs Act 1967, 128(2), (3), (4) 132 & 135(1)*

Acting upon suspicion that an offence under s. 135(1)(d) of the Customs Act 1967 ('Act') had been committed, the defendants (i) seized 2399 cartons of beer/apple cider from Allied Warehouse (M) Sdn Bhd; and (ii) served the notice of seizure of the goods on the plaintiff, the freight forwarding agent appointed by the owner. When the plaintiff's request for the release of the goods was refused by the defendants and not referred to the court, the plaintiff proceeded to file originating summons ('OS') at the High Court, for (i) a declaration that the defendants failed to observe the statutory requirements under s. 128(3) of the Act and such failure rendered the seizure of the goods wrongful; and (ii) general, special and exemplary damages. Dismissing the OS, the High Court held that it was only the legal owner who could seek the release of the goods. However, upon appeal, the Court of Appeal set aside the High Court's decisions and ordered the defendants to pay damages, to be assessed by the Registrar, to the plaintiff. In its application for assessment of damages before the Senior Assistant Registrar ('SAR'), the plaintiff claimed for, *inter alia*, the sum of RM6,277,543.17 as special damages being value of the goods and RM3,399,357 as the detention demurrage charges incurred from the date of seizure till the date of return. The SAR awarded nominal, general and exemplary damages but rejected the claim for the value of goods seized and the detention demurrage charges on the basis that they were items of special damages and the plaintiff had not specifically pleaded for these losses. Hence, the present appeal. In support of its appeal, the plaintiff submitted that (i) the person who is entitled to recover the value of goods under s. 132 of the Act is the person from whom the goods were seized, not the legal owner; (ii) the decision of the Court of Appeal, that as a freight forwarding agent, it was entitled under s. 128(2) of the Act to seek the release of the goods from the defendants, gave the plaintiff

the requisite *locus standi* to claim for the value of the goods under s. 132 of the Act; and (iii) it was entitled to claim for the value of the goods on the basis of its position which was akin to a bailee of goods.

Held (dismissing appeal with costs):

(1) A High Court Judge hearing an appeal against a SAR's decision, on an assessment of damages, is not limited by the rule that appellate interference is only warranted where the SAR had erred on a matter of principle, had misapprehended the facts or had, for other reasons, made a wholly erroneous estimate of the damages. (para 11)

(2) The goods were seized from the plaintiff and the plaintiff was not the legal owner of these goods. Section 128(4) of the Act makes a distinction between a person asserting that he is the owner of the goods and the person from whom they were seized. Section 132 of the Act, however, does not state who can bring an action for the value of the goods where the seizure is unlawful. The plaintiff's proposition that the person who is entitled to bring a claim under s. 132, is the person from whom the goods were seized, is not supported by any authority and therefore, was not accepted. (paras 22 & 23)

(3) A bailee can recover the full value of the goods from the tortfeasor who damaged or destroyed them. To constitute bailment, possession of the goods must be transferred by its owner/bailor to bailee as possession is central to bailment. However, the owner had not transferred the possession of the goods to the plaintiff as bailee. The plaintiff's role as forwarding agent was to arrange for the shipment of the goods to the consignees in Singapore. Whilst it was true that the goods were seized from the plaintiff's custody, custody *per se* did not amount to possession. The onus was on the plaintiff to show that at the material time it was the bailee of the owner's goods but *this* it failed to do. In the circumstances, the plaintiff failed to show there was a relationship of bailor and bailee between the owner and it. Furthermore, there was nothing mentioned in the intitulement of the OS to demonstrate that the plaintiff's claim for damages was also premised on bailment. (paras 24-26)

(4) The goods here did not belong to the plaintiff. Any action by the owner/bailor to recover the value of the goods from the plaintiff would, in light of ss. 104 and 105 of the Act, have no prospect of success as the destruction of the goods in the present case was not due to the latter's negligence or misconduct. In the circumstances, it would be against all notions of justice to allow the plaintiff to recover the value of the goods from the defendants as this would tantamount to compensating the plaintiff in damages for a loss it had never suffered. (para 27)

(5) The plaintiff's claim for detention/demurrage charges, arising from the seizure of the containers, was premised on invoices and receipts issued by the shipping agent. The defendants had not agreed to the authenticity and contents of the documents. However, the plaintiff did not call the makers of the invoices and receipts. In the absence of the makers, the plaintiff could not rely on these documents and its claim for detention/demurrage charges incurred could not be allowed. (paras 28 & 29)

Case(s) referred to:
Chabbra Corp Pte Ltd v. Owners of the Ship or Vessel Jag Shakti [1986] AC 337 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***
The Winkfield [1902] P 42 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 104, 105
Customs Act 1967, ss. 128(2), (3), (4), 132, 135(1)(d)

For the plaintiff - Ravendran JC Ramalu & Janeni Ravendran; M/s Ravendran & Assocs
For the defendants - Natrah Mazman; FC

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah J:

[1] This is an appeal by Modern Freight Express, the plaintiff, against the outcome of an assessment of damages heard by the learned Senior Assistant Registrar. The case concerns goods that were wrongfully seized by the Customs Department.

[2] The principal issue raised here is whether the Senior Assistant Registrar was correct in not awarding the plaintiff as damages the value of those goods. Before turning to the rival submissions of the parties, I will briefly record the essential facts and then set out the relevant statutory material.

Essential Facts

[3] The facts giving rise to this appeal can be shortly stated. On 9 November 2015, the defendants seized 2399 cartons of beer/apple cider ("the goods") from the Allied Warehouse (M) Sdn Bhd in Westport, Port Klang on suspicion that an offence under s. 135(1)(d) Customs Act 1967 had been committed. Following the seizure, the defendants served the notice of seizure of the goods on the plaintiff, a freight forwarding agent. It had been appointed by the owner to manage the declaration, clearance and shipping of the goods to the respective consignees in Singapore.

[4] The plaintiff made a written request under s. 128(2) of the Customs Act for the release of the goods. The defendants refused and did not refer the plaintiff's claim to the court as required by law.

[5] Whereupon, on 14 January 2016, the plaintiff filed the present originating summons in the Shah Alam High Court for a declaration that the defendants had failed to observe the statutory requirements under s. 128(3) of the Customs Act, and that the failure rendered the seizure of the goods wrongful and sought general and special damages and exemplary damages. On 8 August 2016, the High Court held that it was only the legal owner who could seek for the release of the goods, and therefore, dismissed the originating summons.

[6] The plaintiff successfully appealed to the Court of Appeal and the decision of the High Court was set aside and the plaintiff's claim was allowed. The court observed at paras 34 and 37:

> Quite apart from the above, sub-s. 128(2) expressly provides that 'any person asserting that he is owner of such good' has a right to claim the goods. The words 'asserting that he is owner' in our view are wider than 'lawful owner' (pemunya yang sah). As decided by this court in *Mehdi Dadashi Havadarag*h, an unnecessarily restrictive interpretation ought not to be accorded to the words specified in s. 128(2). Further, under s. 2 of the Act, the word 'owner' includes 'any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods. There was thus no merit in the defendants' averment that the plaintiff must be 'pemunya yang sah' and that 'rujukan ke mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa satu bulan dari tarikh penyitaan barangan tersebut'.
>
> In the light of the authorities quoted earlier, we ruled that pursuant to sub-s. 128(3) of the Act, where a written claim is made by the plaintiff for the said goods within one calendar month from the date of seizure and where no prosecution is commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the defendants shall release the goods or refer the claim to the magistrate court. Since the defendants had failed to do either, we found that the defendants have failed to observe the statutory requirements under s. 128 of the Act.

[7] The Court of Appeal ordered damages to be assessed by the Registrar of the High Court and to be paid by the defendants to the plaintiff. In the meantime, the Customs Department destroyed the goods in June 2017 as they were perishable items and their shelf life had expired.

[8] On 14 April 2018, the plaintiff applied for assessment of damages before the Senior Assistant Registrar. The plaintiff claimed among others, a sum of RM6,277,543.17 as special damages being value of the goods and a further sum of RM3,399,357.60 as detention demurrage charges incurred from date of seizure till the date of return on 8 September 2017.

[9] On 7 December 2018, the Senior Assistant Registrar awarded damages as below:

(i) RM10,000 as nominal damages

(ii) RM10,000 as general damages

(iii) RM5,000 as exemplary damages

(iv) and made no order as to costs

[10] The learned Senior Assistant Registrar declined to allow the claim for the value of the goods seized and the detention demurrage charges on the basis that these were items of special damages and the plaintiff had not specifically pleaded for these losses. Hence this appeal by the plaintiff.

The Law Applicable

[11] It is settled law that a High Court Judge hearing an appeal against a Senior Assistant Registrar's decision on an assessment of damages is not limited by the rule that appellate interference is only warranted where the Senior Assistant Registrar had erred on a matter of principle, had misapprehended the facts or had, for other reasons, made a wholly erroneous estimate of the damages.

[12] In this regard, His Lordship Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 at p. 723; [1994] 2 MLJ 97 said at p. 106 as follows:

> Two things are plain from the above passage in the judgment of Lord Atkin (in *Evans v. Bartlam* [1937] AC 473, [1937] 2 All ER 646), namely:
>
> (1) in an appeal from a discretionary order of the master (equivalent here to a senior assistant registrar) to a judge in chambers, the judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the master's discretion; and
>
> (2) so far as the master's decision is concerned, the judge will give it the weight it deserves.

The Statutory Provisions

[13] Before I consider the rival submissions made to me, it is convenient to set out the statutory provisions relevant to the appeal. The parties referred to provisions in the Customs Act 1967 and the Contracts Act 1950:

Customs Act

section 2

Owner in respect of goods includes any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods;

section 128

(1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph 115(1)(a) or paragraph 115(1)(b); or

(c) such goods are returned under the said paragraph 115(1)(a) or paragraph 115(1)(b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or paragraph 115(1)(b), as the case may be, be released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall

proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or paragraph 115(1)(b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or paragraph 115(1)(b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

Section 132

No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief other than an order for the return of such goods or the payment of their value unless such seizure was made without reasonable or probable cause.

Contracts Act

section 101

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation – If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment.

Section 104

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

Section 105

The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.

A **The Rival Submissions**

[14] In essence, it was the plaintiff's contention that the person who is entitled to recover the value of the goods under s. 132 of the Customs Act is the person from whom the goods were seized, and not the legal owner. It was submitted that the decision of the Court of Appeal that as the freight forwarding agent, it was entitled under s. 128(2) of the Customs Act to seek the release of the goods from the defendants gave it the requisite *locus standi* to claim for the value of the goods under s. 132.

[15] The plaintiff argued further that the fact that the defendants had served the notice of seizure of the goods on it as the freight forwarding agent, as opposed to the legal owner, was consistent with its interpretation of s. 132 of the Customs Act. The legal owner would thus be precluded from bringing a claim under s. 132 as the goods were not seized from the former.

[16] In the alternative, the plaintiff argued that it was entitled to claim for the value of the goods on the basis of its position which was akin to a bailee of goods. In law, a bailee can sue a wrongdoer for the value of goods simply by reason of the bailee's possession as possession is, as against the wrongdoer, full and complete ownership. It was submitted that it had possession of the goods at the time of seizure, and as such was entitled as bailee to recover the full value of the goods from the wrongdoers, the defendants. The plaintiff further argued that the defendants need not worry about being sued by the legal owner for the same relief, as the law requires it as bailee to account to the bailor for the amount recovered.

[17] In support of the above propositions, the plaintiff relied on the following passage in *The Winkfield* [1902] P 42 where it was held:

> Therefore, as I said at the outset, and as I think have now shewn by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title-that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each

must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor.

[18] The court was also referred to the decision of the Privy Council in *Chabbra Corp Pte Ltd v. Owners of the Ship or Vessel Jag Shakti* [1986] AC 337 where Lord Brandon of Oakbrook said:

It has further, in their Lordships' opinion, been established, by authority of long standing, that where one person, A, who has or is entitled to have the possession of goods, is deprived of such possession by the tortious conduct of another person, B, whether such conduct consists in conversion or negligence, the proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given. For this purpose it is irrelevant whether A has the general property in the goods as the outright owner of them, or only a special property in them as pledgee, or only possession or a right to possession of them as a bailee. Furthermore, the circumstance that, if A recovers the full market value of the goods from B, he may be liable to account for the whole or part of what he has recovered to a third party, C is also irrelevant, as being *res inter aliosacta*.

[19] The defendants countered the plaintiff's argument on s. 132 of the Customs Act by submitting that though it was true that the Court of Appeal had ruled that the plaintiff had *locus standi* under s. 128(2) to apply for the return of the goods, but this did not make the plaintiff the legal owner of those goods. It was submitted the plaintiff's right to seek the release of the goods under s. 128(2) made sense as the goods were seized from the plaintiff. However, it was argued that the only person who can claim for the value of the goods under s. 132 was the legal owner, and not the plaintiff. The legal owner of the goods here was the Malaysian importer.

[20] The defendants further submitted that the losses the plaintiff can claim under s. 132 would be confined to the losses it had suffered as a freight forwarding agent and not as owner unless it can show it has compensated the legal owner for the loss of his goods. The plaintiff's claim for the value of the goods was misconceived and without basis as there is no evidence in the present case to show that the plaintiff has compensated the legal owner.

[21] In responding to the plaintiff's alternative argument that it has the requisite *locus standi* by virtue of its position as bailee, the defendants pointed out that the position under English common law that the bailee must account to the bailor for damages recovered from the tortfeasor would not apply here in view of ss. 104 and 105 of the Contracts Act. It was argued that the effect

of these provisions was to preclude a bailor from suing the bailee for the destruction or loss of goods unless the same was due to the negligence or misconduct of the latter. It was pointed out that as the destruction of the goods in this case was not due to negligence or misconduct of the plaintiff, the owner would by virtue of ss. 104 and 105 be without a remedy. In the circumstance, it would be contrary to justice to permit the plaintiff to claim for the value of the goods when ss. 104 and 105 would preclude the owner from suing it as the bailee.

Whether Freight Forwarding Agent Can Recover The Value Of The Goods

[22] It is apposite to note that s. 128(4) makes a distinction between a person asserting that he is the owner of the goods and the person from whom they were seized. It is common ground that the goods were seized from the plaintiff, and that the plaintiff is not the legal owner of these goods. Section 132, however, does not state who can bring an action for the value of the goods where the seizure is unlawful. The plaintiff's proposition that the person who is entitled to bring a claim under s. 132, is the person from whom the goods were seized is not supported by any authority. Interestingly, counsel's research did not unearth any cases in Malaysia or England where a freight forwarding agent has been allowed to claim for the value of the goods. On the contrary, the authorities cited by the plaintiff seemed to support the position taken by the defendants.

[23] I therefore do not accept the plaintiff's submission that the person who can seek the value of the goods under s. 132 of the Customs Act is the person from whom the goods were seized.

[24] That brings me to the plaintiff's submission based on bailment. I pause here to observe that there is nothing mentioned in the intitulement of the "originating summons" to demonstrate that the plaintiff's claim for damages is also premised on bailment.

[25] I accept that the law in relation to bailment cases is as set out in the long line of cases cited by the plaintiff. A bailee can recover the full value of the goods from the tortfeasor who damaged or destroyed them. It is trite that to constitute bailment, possession of the goods must be transferred by its owner/bailor to bailee as possession is central to bailment.

[26] In the instant case, I am not persuaded based on the evidence that the owner had transferred the possession of the goods to the plaintiff as bailee. The plaintiff's role as forwarding agent was to arrange for the shipment of the goods to the consignees in Singapore. Whilst it is true that the goods were seized from the plaintiff's custody, but custody *per se* does not amount to possession. The onus was on the plaintiff to show that at the material time it was the bailee of the owner's goods but this it failed to do so. In the circumstance, I fail to see how the plaintiff can argue that there was a relationship of bailor and bailee between the owner and it.

[27] Even if I am wrong on this issue, there is yet another obstacle that the plaintiff must surmount. The goods here do not belong to the plaintiff. Any action by the owner/bailor to recover the value of the goods from the plaintiff would, in light of ss. 104 and 105, have no prospect of success as the destruction of the goods in the present case was not due to the latter's negligence or misconduct. In the circumstance, it would be against all notions of justice to allow the plaintiff to recover the value of the goods from the defendants as this would tantamount to compensating the plaintiff in damages for a loss it has never suffered.

Detention/Demurrage Charges

[28] I will next briefly deal with the plaintiff's claim for detention/demurrage charges arising from the seizure of the containers. This part of the claim was premised on invoices and receipts issued by the shipping agent. The defendants had not agreed to the authenticity and contents of the documents. However, the plaintiff did not call the makers of the invoices and receipts.

[29] In the absence of the makers, I accept the defendants' argument that the plaintiff cannot rely on these documents and its claim for detention/demurrage charges incurred cannot be allowed.

Conclusion

[30] For the foregoing reasons, I dismiss the appeal with costs of RM10,000 to the defendants.